

No. 87127

IN THE
MISSOURI COURT OF APPEALS
EASTERN DISTRICT

IN THE MATTER OF THE COMPETENCY OF
STEVEN PARKUS.

Appeal from the Circuit Court of Washington County, Missouri
The Honorable Robert C. Stillwell, Judge

ATTORNEY GENERAL'S STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

This court has jurisdiction as a timely notice of appeal was filed from a “Judgment and Order” by the Washington County Circuit Court, a circuit court within the geographical jurisdiction of this court, and the subject matter of the case may not be within the exclusive appellate jurisdiction of the Missouri Supreme Court. Missouri Constitution Article V, §3 (as amended in 1982). While the Attorney General filed a notice of appeal to the Missouri Supreme Court (Legal File - hereinafter LF - page 255), that court transferred the appeal to this court in an order dated October 26, 2005 (No. SC87164).

STANDARD OF REVIEW

There has never been an appeal in a §552.060 proceeding; thus, the standard of review is uncertain. Generally, issues concerning the authority and power of the circuit court are legal issue requiring de novo appellate review. E.g., Nguyen v. Wang, 182 S.W.3d 688, 696 (Mo. App. E.D. 2006). And the Missouri Supreme Court has extended de novo review to questions concerning whether a condemned is mentally retarded. E.g., State v. Taylor, 134 S.W.3d 21, 26-27 (Mo. banc 2004).

STATEMENT OF FACTS

This case is about whether the Washington County Circuit Court had jurisdiction to order resentencing of Steven Parkus without its fulfilling its statutory requirement to issue a report to the Governor. The case is also about whether Steven Parkus is “mentally retarded.”

The events that gave rise to these current questions occurred long ago. Steven Wesley Parkus was indicted on December 19, 1985, with first degree murder charging that on or about November 24, 1985, after deliberation, he knowingly killed Mark Steffenhagen by choking him. After a change of venue from Cole County, the cause proceeded to trial in the Circuit Court of Cape Girardeau County, the Honorable A.J. Seier, presiding.

During Mr. Parkus’ direct appeal, the Missouri Supreme Court summarized the circumstances around Parkus’ murder of Steffenhagen:

On November 24, 1985, Mark Steffenhagen and [Parkus] were inmates in the Missouri State Penitentiary (MSP), in Housing Unit 2-B, a Special Treatment (protective custody) Unit for prisoners who had been threatened with sexual abuse or had exhibited suicidal tendencies. Steffenhagen returned from supper sometime between 5:30 and 6:00 p.m. and was found strangled in his cell about 7:15. Larry Weixelbaum, an inmate walkman on fourwalk, who described the routine followed by inmates returning to their cells from supper, stated that upon leaving the dining hall, they returned to their walks and waited at their cells until the guard simultaneously opened all doors, at which time

each entered his cell and the doors were locked. On the evening of the murder, Weixelbaum was released from his cell after the lock down to perform his duties as walkman and as he moved along the corridor he noticed the bars of Steffenhagen's cell, number 116, were covered by a blanket but he thought little of it because Steffenhagen often put up a blanket for warmth. At about 7:15, Weixelbaum heard someone calling from Steffenhagen's cell and he saw a hand "waving him over". He went to the cell and [Parkus], who was there instead of in his own cell, shoved the blanket aside, and said, "[m]an, you got to get me out of here." Weixelbaum pulled down the blanket and told [Parkus] to turn on the light. It was then that he could see Steffenhagen lying on his left side in the bed and he told [Parkus] to roll him over to determine what was wrong. [Parkus] responded, "[m]an, he ain't breathing, I think I killed him. You are going to have to get me out of here." Weixelbaum immediately notified Sergeant Richard Hagendorf who was, at that time, on twowalk and as Hagendorf made his way to fourwalk, he released the lock on cell no. 116. As Hagendorf approached the cell [Parkus] stepped into the hall, told Hagendorf that "[he] didn't do nothing" and tried to walk away. Hagendorf stopped [Parkus] and ordered him to stay in front of the cell while he examined Steffenhagen. When Weixelbaum had checked Steffenhagen, he thought he felt a pulse but Hagendorf found none and called for medical assistance. About that time [Parkus] began running toward the stairs, but Hagendorf caught him,

placed him in handcuffs and moved him to a secure area where he waited for assistance. Further examination revealed Steffenhagen was dead.

An autopsy performed the next day disclosed scrapes on Steffenhagen's nose and chin and a cut on the lip suggesting he had been struck by a blunt object such as a fist. Bruises on the back of his hands, wrist and ankles indicated his arms and legs had been tied and that he had struggled against the bonds. External contusions on the neck as well as internal damage to the larynx demonstrated the cause of Steffenhagen's death was manual strangulation. From an examination of the stomach contents it was determined that death probably occurred less than an hour after Steffenhagen had eaten supper.

State v. Parkus, 753 S.W.2d 881, 883 (Mo. banc 1988) (footnotes omitted). From this evidence, the jury concluded that Mr. Parkus was guilty of first degree murder.

During the punishment phase of trial, the state presented evidence that Parkus was serving a thirty-year sentence for rape and sodomy from the Circuit Court of Cole County. Parkus also had pled guilty to assault with intent to rape, escape from jail and assault with intent to rob. After hearing the evidence in aggravation and mitigation of punishment, the jury sentenced Parkus to death. The Missouri Supreme Court affirmed the conviction and sentence, State v. Parkus, 753 S.W.2d 881 (Mo. banc 1988), and the United States Supreme Court declined review, Parkus v. Missouri, 488 U.S. 900 (1988).

Mr. Parkus then filed a motion for post-conviction relief under Missouri Supreme

Court Rule 29.15. After amendment of the motion and an evidentiary hearing, the circuit court denied post conviction relief. Again, the Missouri Supreme Court affirmed, Parkus v. State, 781 S.W.2d 545 (Mo. banc 1989), and the United States Supreme Court declined review, Parkus v. Missouri, 495 U.S. 940 (1990).

Mr. Parkus then filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of Missouri. The district court denied habeas relief. Mr. Parkus appealed, and the court of appeals affirmed in part and remanded for additional consideration of some issues. Parkus v. Delo, 33 F.3d 933 (8th Cir. 1994). On remand, the district court conducted an evidentiary hearing on Parkus' mental state of the time of the murder. After hearing, the district court denied habeas relief and the court of appeals affirmed. Parkus v. Bowersox, 157 F.3d 1136 (8th Cir. 1998). The Supreme Court declined certiorari review. Parkus v. Bowersox, 527 U.S. 1043 (1999).

On August 7, 2000, the Missouri Department of Corrections initiated an inquiry to determine if Mr. Parkus has a mental disease or defect excluding fitness for execution (LF, pages 1, 8). Section 552.060, RSMo. 2000. The circuit court entered orders allowing evaluation of Mr. Parkus by physicians (LF, pages 16, 17).

On September 23, 1999, Governor Mel Carnahan issued Executive Order No. 99-08 that ordered "a stay of execution for Steven Parkus until such time as a final determination can be made pursuant to Section 558.060 as to whether or not Steven Parkus has a mental disease or defect excluding fitness for execution." http://www.sos.mo.gov/library/reference/orders/1999/eo99_008-asp (last visited May 4, 2006).

In his direct appeal case before the Missouri Supreme Court, Mr. Parkus filed a motion to recall the mandate, or, in the alternative, a petition for writ of habeas corpus (LF, page 19). The Missouri Supreme Court treated the filing as a petition for writ of mandamus (LF, page 19). In response to the filing, the Missouri Supreme Court issued the following order:

NOW, THEREFORE, you the said Circuit Court of Washington County are **COMMANDED** to finally determine pursuant to Section 552.060, RSMo., whether Steven Wesley Parkus has a mental disease or defect and finally determine pursuant to Section 565.030 whether Steven Wesley Parkus has mental retardation excluding fitness for execution or show cause, if any you have, by written return, before this Court on or before **September 25, 2003**, why you should not do so.

(LF, page 19). The circuit court made a return to the preliminary writ (LF, page 42) as well as thirteen supplemental returns (LF, pages 67, 75, 88, 111, 128, 132, 139, 142, 145, 211, 241, 244, 267).

On June 1, 2004, Mr. Parkus moved to bifurcate the inquiry (LF, page 95). The Attorney General opposed the request (LF, page 104). The circuit court sustained the motion (LF, page 110).

The circuit court conducted the inquiry into whether Mr. Parkus is mentally retarded (LF, page 126). Mr. Parkus and the Attorney General submitted post-hearing briefs (LF, pages 148, 214, 229). On September 28, 2005, the Washington County Circuit Court entered

“Judgment and Order” (LF, page 247). The circuit court ordered:

THEREFORE IT IS ORDERED, DECREED AND ADJUDGED that the Court finds pursuant to Section 565.030.6 that the Defendant Steven Parkus is mentally retarded and therefore it would be cruel and unusual punishment to inflict the death penalty as declared in Atkins and Johnson, supra, and should be re-sentenced to life imprisonment without eligibility for probation, parole, or release except by act of the governor. SO ORDERED!

(Appendix 8; LF, page 254). The Attorney General appealed to the Supreme Court of Missouri (LF, page 258). That court transferred the appeal to the Missouri Court of Appeals in an order dated October 26, 2005 (No. SC87164).

POINTS RELIED ON

I.

The circuit court erred when it entered its September 28, 2005 “Judgment and Order” because that order did not rule upon or otherwise decide Parkus’ competence for execution in that the circuit court did not determine if Mr. Parkus “as a result of mental disease or defect . . . lacks capacity to understand the nature and purpose of the punishment about to be imposed upon him or matters in extenuation, arguments for executive clemency or reasons why this sentence should not be carried out.”

Goldberg v. Mos, 631 S.W.2d 342 (Mo. 1982).

II.

The circuit court erred by entering judgment that Mr. Parkus “should be resentenced to life imprisonment” because the circuit court had no jurisdiction to enter such an order in that the §552.060 proceeding before the circuit court was not one where the circuit court had the authority to order Parkus’ resentencing.

§552.060, RSMo. 2000.

III.

The circuit court erred by stating that Parkus should be resentenced to life without probation or parole because the circuit court did not find that Parkus was mentally retarded in that 1) the circuit court only concluded that Parkus was “borderline mentally retarded,” or 2) the circuit court made no finding concerning

Parkus' current IQ or finding current continual extensive related deficits.

Atkins v. Virginia, 536 U.S. 304 (2002);

Goodwin v. State, 2006 WL 1147691(Mo. banc May 2, 2006); and

Johnson v. State, 102 S.W.3d 535 (Mo. banc 2003).

ARGUMENT

I.

The circuit court erred when it entered its September 28, 2005 “Judgment and Order” because that order did not rule upon or otherwise decide Parkus’ competence for execution in that the circuit court did not determine if Mr. Parkus “as a result of mental disease or defect . . . lacks capacity to understand the nature and purpose of the punishment about to be imposed upon him or matters in extenuation, arguments for executive clemency or reasons why this sentence should not be carried out.”

The litigation before the circuit court began when the Missouri Department of Corrections filed a “Petition for Inquiry Pursuant to §552.060 RSMo. Into Competency of Inmate Steven Parkus Condemned for Death” (LF, page 8). The circuit court did not decide the competency or fitness of Mr. Parkus for execution in its September 28, 2005 judgment (LF, page 247). Since that question remains to be answered, the court of appeals should remand the cause to the circuit court for its answer to the question that has been before it since August 7, 2000.

On September 28, 2005, the Washington County Circuit Court entered a “Judgment and Order” purportedly finding that Parkus had “borderline” mental retardation and “should be resentenced to life imprisonment without eligibility for probation, parole or release except by act of the governor” (emphasis added) (LF, page 277). That “Judgment and Order” did not resolve the issues under §552.060, RSMo. 2000 that were before the circuit court. The September 28, 2005 “Judgment and Order” is not a certification “to the Governor and to the

Director that the prisoner does not have a mental disease or defect of the type referred to in [Section 552.060.1].” Section 552.060.4, RSMo. 2000. Nor is the September 28, 2005 “Judgment and Order” a certificate “to the Governor and to the Director that the prisoner has a mental disease or defect of the type referred to in [Section 552.060.1].” Section 552.060.4, RSMo. 2000. The circuit court has not informed any of the interested parties to the inquiry - the offender, the Attorney General, the Department of Mental Health or the prosecuting attorney - whether Parkus is fit for execution. As should be apparent, not all issues have been resolved by the circuit court; thus, the judgment is not a final judgment. See Shelter Mut. Ins. Co. v. Kramer, 741 S.W.2d 302, 303 (Mo. App. S.D. 1987) quoting Goldberg v. Mos, 631 S.W.2d 342, 345 (Mo. 1982); Calvert v. Latimer, 670 S.W.2d 588 (Mo. App. E.D. 1984). The cause should be remanded to the Circuit Court of Washington County with directions that it fulfill its responsibility under §552.060, RSMo. 2000.

Parkus may contend that the proceeding under §552.060, RSMo. 2000 is now “moot” because he has been declared “mentally retarded.” The Attorney General disagrees. The Cape Girardeau County Circuit Court’s criminal judgment sentencing Parkus to death has not been vacated or set aside. That judgment exists and continues to be in effect. Nor has the Missouri Supreme Court’s mandate affirming that judgment been recalled or withdrawn. Parkus remains under capital sentence. And as noted above, the legal issue is not whether Parkus has received relief but whether all issues have been resolved for all parties in the September 28, 2005 judgment. They have not. The cause should be remanded to the Washington County Circuit Court for a final judgment under §552.060, RSMo. 2000.

II.

The circuit court erred by entering judgment that Mr. Parkus “should be resentenced to life imprisonment” because the circuit court had no jurisdiction to enter such an order in that the §552.060 proceeding before the circuit court was not one where the circuit court had the authority to order Parkus’ resentencing.

The September 28, 2005 order of the Washington County Circuit Court seems to require the resentencing of Mr. Parkus by the Cape Girardeau County Circuit Court (LF, page 277). This occurred even though the Washington County Circuit Court had no jurisdiction to approve, reverse, modify or vacate the judgment of the Cape Girardeau County Circuit Court. Because the Washington County Circuit Court did not have the power, authority or jurisdiction to order the resentencing of Parkus, the judgment should be reversed.

The inquiry began before the Washington County Circuit Court on August 7, 2000. On that day, the Missouri Department of Corrections initiated the inquiry into Mr. Parkus’ competence or fitness to be executed (LF, page 8). The Department thus invoked the legislatively created inquiry procedure, which provided the Washington County Circuit Court jurisdiction to conduct the inquiry in §552.060, RSMo. 2000 (See LF, page 8).

Section 552.060.3 contemplates that the circuit court will conduct an inquiry into the mental condition of the condemned offender.¹ Section 552.060.3, RSMo. 2000. The

¹The court is familiar with §552.020 and §552.030 that govern capacity to stand trial

legislature directs the circuit court, at the conclusion of the inquiry, to certify to the Governor and to the Director of the Missouri Department of Corrections that the offender either has or does not have a mental disease or defect rendering the offender unfit for execution under §552.060.1, RSMo. 2000. The legislature did not extend to the circuit court the power to vacate or set aside a previously imposed sentence. Section 552.060.4, RSMo. 2000. The legislature did not authorize the circuit courts conducting an inquiry to order that an offender be resentenced. *Id.* The legislature recognized the possibility of an offender’s recovery from the mental disease or defect, and such recovery would allow the execution of the offender to proceed. Section 552.060.4, RSMo. 2000. The legislature made clear that the powers to set aside a death sentence resided in other courts pursuant to other grants of authority. “Nothing in this chapter shall be construed to limit the Governor or any court in the exercise of any of their powers in any other manner under the law or Constitution of Missouri.” Section 552.060.5, RSMo. 2000.

Alternative sources of jurisdiction do not exist. The Washington County Circuit Court was not an appellate court reviewing trial court error on direct appeal. See §547.070, RSMo. 2000. Indeed, Mr. Parkus’ direct appeal occurred long ago. See State v. Parkus, 753 S.W.2d 881 (Mo. banc 1988). The circuit court’s jurisdiction to vacate a sentence could not be based

and capacity at the time of the offense, issues not germane to this appeal. Less familiar is §552.060 concerning competence to be executed. Each statute focuses on competence at a different point in the criminal justice process.

on Missouri Supreme Court Rule 29.15. The Washington County Circuit Court was not the court of conviction, that being Cape Girardeau County. Missouri Supreme Court Rule 29.15(c). And Mr. Parkus' Rule 29.15 motion was resolved long ago. Parkus v. State, 781 S.W.2d 545 (Mo. banc 1989). Nor did the Washington County Circuit Court claim that it was acting in state habeas corpus jurisdiction from Missouri Supreme Court Rule 91 (LF, pages 270-77), nor could it because for an offender under capital sentence, that jurisdiction rests exclusively within the Supreme Court of Missouri. Missouri Supreme Court Rule 91.02(b).

And even under these sources of jurisdiction, the power of the circuit court would be limited. The Missouri Supreme Court has not stated that a mentally retarded offender "should be resentenced to life imprisonment." In exercising Rule 29.15 appellate jurisdiction, the Missouri Supreme Court did not resentence the offender to life imprisonment; instead it remanded the cause and ordered a new penalty phase. Johnson v. State, 102 S.W.3d 535, 541 (Mo. banc 2003). The Washington County Circuit Court identified no jurisdiction that allowed it to order that Parkus be resentenced.

Nor does the Washington County Circuit Court have jurisdiction under §565.030, RSMo. Cum. Supp. 2005. That statute provides for the procedures to be used at the penalty phase of a first degree murder trial. The competency hearing held on July 12 and 13, 2004 was not the penalty phase of a criminal trial. The hearing was not held before the sentencing court. And, no provision of §565.030 instilled in the Washington County Circuit Court the power to order that Mr. Parkus be resentenced - the power asserted by the circuit court in its

September 28, 2005 judgment.

The circuit court might argue that it was instilled with jurisdiction by the Missouri Supreme Court's order of August 26, 2003. That order provided:

NOW, THEREFORE, you the said Circuit Court of Washington County are **COMMANDED** to finally determine pursuant to Section 552.060, RSMo., whether Steven Wesley Parkus has a mental disease or defect and finally determine pursuant to Section 565.030 whether Steven Wesley Parkus has mental retardation excluding fitness for execution or show cause, if any you have, by written return, before this Court on or before **September 25, 2003**, why you should not do so.

(LF, page 19). A contention by the circuit court that the Missouri Supreme Court order injected the circuit court with jurisdiction would be erroneous. The Missouri Supreme Court's order does not purport to convey to the Washington County Circuit Court the power to order a resentencing (assuming the Supreme Court could even do so) (LF, page 19). The Missouri Supreme Court's order does not purport to convey to the Circuit Court of Washington County the power to decide a direct appeal in a capital punishment case. Nor does the August 26, 2003 order convey to the Washington County Circuit Court the power to consider an untimely, unverified, and indeed, unfiled post-conviction relief motion under Missouri Supreme Court Rule 29.15. Nor does the August 26, 2003 order convey to the Washington County Circuit Court jurisdiction to decide a motion to recall the mandate or a petition for writ of habeas corpus (LF, page 19). All that the August 26, 2003 order does is

what it says it does. It directs the circuit court to determine whether “Parkus has mental retardation excluding fitness for execution” (LF, page 19). And the Missouri Supreme Court reminded the Washington County Circuit Court that its power was “pursuant to §552.060, RSMo.,” not pursuant to any other source of authority. In other words, the Washington County Circuit Court was ordered to make a finding about whether mental retardation existed as part of its §552.060, RSMo. analysis, which as demonstrated in Point I, it has yet to do.

Mr. Parkus may argue that this criticism of the circuit court’s power is misplaced because the statement “should be resentenced to life imprisonment” is dicta in that it is merely the circuit court’s opinion that some court somewhere should resentence Parkus. So, that argument goes, the circuit court did not act outside its power because its direction was dicta, a declaration of a normative statement that some court, somewhere should resentence Parkus. But it is not the court’s prerogative to offer advisory opinions. State v. Self, 155 S.W.3d 756 (Mo. banc 2005). And that interpretation of the circuit court’s order leads to the obvious question of what effect the September 28, 2005 “Judgment and Order” had. Because the circuit court has not conducted any additional proceeding since the September 28, 2005 judgment, the circuit court appears to have thought that it was actually vacating the Cape Girardeau County Circuit Court’s judgment. The declaration of such a normative statement, without more, is a classic example of an advisory opinion or decision. Such decisions are not part of Missouri practice.

The Washington County Circuit Court’s statement that Parkus “should be resentenced to life imprisonment without eligibility for probation, parole or release except by act of the

governor” has no jurisdictional basis; thus, the judgment of the circuit court should be reversed.

III.

The circuit court erred by stating that Parkus should be resentenced to life without probation or parole because the circuit court did not find that Parkus was mentally retarded in that 1) the circuit court only concluded that Parkus was “borderline mentally retarded,” or 2) the circuit court made no finding concerning Parkus’ current IQ or finding current continual extensive related deficits.

The Washington County Circuit Court found that Parkus was, in the words of the circuit court, “mentally retarded albeit borderline” (LF, page 251). This conclusion, as acknowledged by the circuit court, does not fit within the medical definition of “mental retardation” (LF, page 248, paragraph 8) or, more importantly, the statutory criteria for mental retardation set forth in §565.030.6, RSMo. 2005 Cum. Supp. Accordingly, the circuit court’s judgment stating that Parkus should be resentenced should be set aside.

Shortly before the Supreme Court decision in Atkins v. Virginia, 536 U.S. 304 (2002), the Missouri legislature created a procedure where, as part of the penalty phase of a first degree murder trial, the jury can consider evidence of an offender’s mental retardation. If the trier of fact finds by preponderance of the evidence that the offender is mentally retarded, then sentence is assessed at life imprisonment without eligibility for probation, parole or release except by act of the Governor. Section 565.030.4(1), RSMo. Cum. Supp. 2005. The legislature defined mental retardation:

As used in this section, the terms “mental retardation” or “mentally retarded” refer to a condition involving substantial limitations in general

functioning characterized by significantly subaverage intellectual functioning with continual extensive related deficits and limitations in two or more adaptive behaviors such as communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure and work, which conditions are manifested and documented before eighteen years of age.

Section 565.030.6, RSMo. Cum. Supp. 2005. In Atkins, the Supreme Court held that the Eighth Amendment precluded the government's execution of a mentally retarded offender, and the court left to the states the responsibility to define mental retardation. Goodwin v. State, 2006 WL 1147691 at *4 (Mo. banc May 2, 2006) citing Atkins v. Virginia, 536 U.S. at 316. So for an offender to be labeled mentally retarded, there must be "significantly subaverage intellectual functioning," Goodwin v. State, 2006 WL 1147691 at *7, which is defined as an individual's having an IQ of about 70 or below. Id. at *8 n.7. And the second requirement in §565.030.6 is that the offender must show continual extensive related deficits and limitations in two or more adaptive behaviors.

The circuit court erred by stating that Parkus should be resentenced to life without probation or parole because the circuit court did not find that Parkus was mentally retarded in that the circuit court only concluded that Parkus was "borderline mentally retarded." The circuit court also made no findings concerning Parkus' current IQ or a finding of continual extensive related deficits.

Significantly, neither § 565.030.6 nor the Missouri Supreme Court's interpretation of

that statute in Goodwin recognizes a category of “mental retardation albeit borderline” (LF, page 251). The circuit court finding is not a finding that correspondences with any statute; thus, the circuit court’s judgment should be reversed.

The circuit court apparently derived “borderline retarded” from Taylor v. State, 126 S.W.3d 755 (Mo. banc 2004) (LF, page 248, paragraph 6). But that decision demonstrates the fallacy of the recent court’s position. In Taylor, Taylor’s expert testified that Taylor’s IQ was in the low normal range but that when Taylor used chemically inhalants, the IQ fell to “borderline retarded.” Taylor v. State, 126 S.W.3d at 762-63. The Missouri Supreme Court rejected the contention that evidence of “borderline mentally retarded” was a sufficient basis to set aside the capital sentence and order a new penalty phase.

Along with Taylor’s claim of ineffective assistance of counsel for failure to present evidence of his mental retardation, he alleges that because he was borderline mentally retarded at the time of the offense, the death penalty is disproportionate and unconstitutional. Because Taylor has failed to present any credible evidence in support of his claim that he was mentally retarded at the time of the offense, his sentence of death is not unconstitutional under Atkin.

Id. at 763 (citations omitted) (emphasis added). In Taylor, the court drew a line between borderline mental retardation and mental retardation. Id. A finding of borderline mental retardation is insufficient under the statute. This conclusion is reinforced by the Stanley Hall litigation reported by the Circuit Court.

That recently an inmate at Potosi named Stanley Hall was executed, his attorney, Nelson Mitten, unsuccessfully attempted to halt the execution claiming Mr. Hall was mentally retarded. Hall's IQ at age 7 was measured at 57 yet subsequent scores were in the 70-75 range placing him in the "borderline mentally retarded range" which by *argumentum a simili*. Mr. Hall's ultimate execution may indicate that there may not be a ban to executing a person who is "borderline mentally retarded" in the State of Missouri. See 19 M.L.W. 281."

(LF, page 248).

The circuit court acknowledged that there were four categories of mental retardation: mild, moderate, severe and profound, and the circuit court also acknowledged that there was no "borderline" category in the current medical literature (LF, page 248). The circuit court's conclusion that Parkus is "mentally retarded albeit borderline" is an insufficient basis upon which to hold that he should be resentenced (LF, page 254).

Conspicuously missing from the Circuit court's conclusion is the current measure of Parkus' intellectual functioning. As noted, §565.030.6, RSMo. Cum. Supp. 2005 contains actually four elements: 1) significantly subaverage intellectual functioning manifested and documented before eighteen years age, 2) continual extensive related deficits and limitations in two or more adaptive behaviors manifested and documented before age eighteen; 3) significantly subaverage intellectual functioning today; and 4) continual extensive related deficits and limitations in two or more adaptive behaviors today. See §§ 565.030.6, RSMo.

Cum. Supp. 2005. The circuit court made no finding as to Parkus' IQ or intellectual functioning today. The circuit court made no finding as to deficit and limitation today. The circuit court did not make a finding that Parkus is mentally retarded today.

In its finding about Parkus' intellectual functioning, the circuit court focused upon the margin of error that an IQ test might have (LF, page 249). The margin of error can be plus or minus five points (LF, page 249). Goodwin v. State, 2006 WL 1147691 at *8 n.7. The circuit court's focus on the margin of error is perhaps explained by Parkus' consistent scoring over 70 on IQ tests. The circuit court cataloged Parkus' full scale IQ scores as 76 at age 7, 72 at age 10, 76 at age 10, a listing of scores 76, 80, 71, 78, 103 and 72 at age 13 and 73 at age 15 (LF, page 250). Because the circuit court did not find that Parkus scored under 70, it focused upon the statical concept of "margin of error" (LF, page 249). The circuit court's premise appears to be that each of those actual IQ numbers overstate the real IQ by five points. But equally likely is the idea that IQ score listed above underestimates the real IQ by five points, the margin of error.

Again, concerning deficits in adaptive behavior, the circuit court made no finding that whether Parkus has such deficits today. Indeed, in light of the testimony by Dr. Myers concerning Parkus' ability to live well at the institution, then the circuit court's omission is understandable. Parkus effectively copes with common life demands and meets the standard of personal independence expected of one who is incarcerated. Goodwin v. State, 2006 WL1147691 at *8. And the little testimony suggesting inability to function did not exclude other factors such as education, motivation, personality characteristics, social and vocational

opportunities and mental disorders that the records cited by the circuit court (LF, pages 252-52). Notwithstanding his lack of education, Parkus is well-read (Tr. 328, 330, 356, 360). Notwithstanding personal characteristic, such as an antisocial personality disorder, he copes adequately with prison life (Tr. 328). Parkus possessed a great deal of historical information about himself (Tr. 326-29, 334) and society (Tr. 332). He can think abstractly (Tr. 332-33). He plays chess (Tr. 356). He uses a physical device called a Cadillac to communicate within his prison cellblock (Tr. 357-58). He made a homemade cigarette lighter (Tr. 358). He has a pen pal (Tr. 359). Mr. Parkus does not possess current deficits in adaptive behavior.

The Circuit court did not find that Parkus was mentally retarded as that term is defined in §565.030.6, RSMo Supp. 2005. Accordingly, the “judgment and order” of the Circuit court should be reversed.

CONCLUSION

WHEREFORE, for the reasons herein stated, appellant prays the court reverse the July 12, 2005 judgment of the Cole County Circuit Court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b)/Local Rule 360 of this Court and contains _____ words, excluding the cover, this certification and the appendix, as determined by WordPerfect 9 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this _____ day of January, 2007.

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RESPONDENT'S APPENDIX

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